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The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.

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TURMOIL IN PUBLIC SECTOR LABOR LAW

By, Martin H. Malin

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RECENT DEVELOPMENTS

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Alec Hausermann, Daniel Quist, Ryan Thoma, and Daniel Zapata

Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes and the National Labor Relations Act.

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TURMOIL IN PUBLIC SECTOR LABOR LAW

By, Martin H. Malin

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I. INTRODUCTION

The Illinois statutes governing public sector collective bargaining have been relatively stable in the second decade of the 21st century with SB 7 enacted in 2011 marking the only significant amendment. Not so in many other states, which have seen significant changes to their laws since the 2010 elections. Major court challenges have been mounted to the changes in Arizona, Michigan and Wisconsin, and voters rejected the changes by referenda in Idaho in November 2012 and Ohio in November 2011. In Michigan, voters rejected by referendum in November 2012 an emergency manager law that authorized abrogation of collective bargaining agreements during periods of fiscal distress only to see it reenacted by a lame duck legislature within a month after the election. This article surveys the turmoil, grouping the changes by category of change.

II. REPEAL OF THE RIGHT TO BARGAIN COLLECTIVELY

Two states, Oklahoma and Tennessee, repealed statutes that provided public employees with collective bargaining rights. On April 29, 2011, Oklahoma Governor Mary Fallin signed House Bill 1593 repealing the Oklahoma Municipal Employee Collective Bargaining Act, which had guaranteed the rights to organize and bargain collectively to employees of municipalities with populations above 35,000.[1] The repeal leaves the decision to bargain to the municipalities' discretion. The repeal's sponsors argued that it was necessary to restore local control over the decision to bargain collectively.[2] The governor maintained that it would control costs.[3]

Tennessee repealed the Education Professional Negotiations Act, which had provided teachers with the right to organize and bargain collectively since 1978, and replaced it with the Professional Educators Collaborative Conferencing Act of 2011 (CCA).[4] The Tennessee Senate voted to repeal the collective bargaining law, but the state House of Representatives voted to limit the scope of bargaining rather than repeal it.[5] The following day, a conference committee voted for the repeal, which passed later that day in both houses.[6]

Under the CCA, between October 1 and November 1, employees may file with the school district a petition for collaborative conferencing supported by a 15 percent showing of interest.[7] If this showing is met, the school board must appoint a committee with equal representation of board members and employees to conduct an election whereby employees vote whether to engage in collaborative conferencing and if so, who shall represent them. The choices for representation must include “unaffiliated” as an option.[8] If a majority votes for collaborative conferencing, the school board appoints a team of between seven and eleven management personnel. The employees are entitled to an equal number of representatives on the committee. Each employee representative option that received at least fifteen percent of the vote is entitled to proportional representation.[9] The committee that conducted the election selects the representatives of the unaffiliated employees, if 15 percent or more of the employees selected that option.[10] The collaborative conferencing committee remains in effect for three years, after which the election process is repeated.[11]

The CCA defines collaborative conferencing as “the process by which [the parties] meet at reasonable times to confer, consult and discuss and to exchange information, opinions and proposals on matters relating to the terms and conditions of professional employee service, using the principles and techniques of interest-based collaborative problem-solving.”[12] The CCA prohibits refusing or failing to participate in collaborative conferencing.[13] It requires the parties jointly to prepare a written memorandum of understanding of any agreement reached, but conditions portions of an agreement requiring funding on the appropriation of such funding by the relevant authority.[14] Further, it expressly declares that the parties are not required to reach agreement; if no agreement is reached, the school board sets employee terms and conditions of employment by board policy.[15] The CCA also appears to authorize director of schools to bypass the employees’ representatives and deal directly with individual employees.[16] Beyond these provisions, the CCA is silent as to the content of the duty to engage in collaborative conferencing. Because Tennessee does not have a labor relations board to administer the CCA, it presumably will be up to the Tennessee courts to determine the content of the duty and the extent to which the generally well-

defined duty to bargain will be applied to the duty to engage in collaborative conferencing.

The Tennessee statute mandates collaborative conferencing with respect to salaries, grievance procedures, insurance, fringe benefits other than retirement benefits, working conditions, leave, and payroll deductions.[17] It expressly prohibits collaborative conferencing with respect to differential pay plans, incentive compensation, expenditure of grants or awards, evaluations, staffing decisions, personnel decisions concerning assignment of professional employees, and payroll deductions for political activities.[18]

Several states, while not repealing their public employee collective bargaining statutes, amended them to deny collective bargaining rights to certain groups of employees. Nevada took bargaining rights away from doctors, lawyers, and some supervisors.[19] Had voters not rejected it, the Ohio enactment would have taken bargaining rights away from university faculty who participate in faculty governance and certain police and firefighter supervisors.[20]

Wisconsin Act 10 took away collective bargaining rights from state university faculty, all employees of the University of Wisconsin Hospitals and Clinics, and day care and home health care providers.[21] Although Act 10 did not repeal the Municipal Employee Relations Act or the State Employee Relations Act, it effectively abolished collective bargaining for all public employees except most law enforcement and fire protection personnel and municipal transit employees if denial of collective bargaining rights to those transit employees would result in the municipality losing federal funds.[22] It prohibits bargaining on any subject other than “base wages,” which expressly excludes overtime, premium pay, merit pay, performance pay, supplemental pay, and pay progressions.[23] Furthermore, base wages may not increase more than the increase in the consumer price index (CPI) as of 180 days before the expiration of the collective bargaining agreement.[24] In many respects, Oklahoma employees have more collective bargaining protection than Wisconsin employees. Although Oklahoma repealed its statute that mandated collective bargaining rights in mid-sized municipalities, it still allows collective bargaining at the option of the employer. In contrast, Wisconsin prohibits collective bargaining even if the employer is willing to engage in it.[25] It is not surprising that Wisconsin Act 10 repealed the declarations in the Municipal and State Employee Relations Acts that had found public employee collective bargaining to be in the public interest.[26]

In *Wisconsin Education Association Council (WEAC) v. Walker*,[27] the United States District Court for the Western District of Wisconsin upheld the

constitutionality of the restricted scope of bargaining against attacks by a coalition of unions. The unions argued that Act 10's disparate treatment of most public employees, on the one hand, and security employees on the other, lacked a rational basis in violation of the Equal Protection Clause of the Fourteenth Amendment and distinguished between employees whose unions had supported Governor Scott Walker in the 2010 election and those who opposed him, in violation of the First Amendment. The court reasoned that "political favoritism is no grounds for heightened scrutiny under the Equal Protection clause." [28] Consequently, the court found that the disparate scope of bargaining survived rational basis scrutiny. [29]

However, in *Madison Teachers, Inc. v. Walker*, [30] the Circuit Court for Dane County held that Act 10's restrictions on bargaining as applied to municipal employees violated the U.S. and Wisconsin constitutions. The Seventh Circuit Court of Appeals has affirmed the district court's upholding of the disparate scope of bargaining while appeal of the Dane County Circuit Court decision is pending.

III. LIMITING THE SCOPE OF BARGAINING

By far, the most radical changes to the scope of bargaining occurred in Wisconsin, but Wisconsin was only one of several states to impose major limits on what may be negotiated. Health care was the economic item most commonly removed from bargaining.

In Wisconsin, although law enforcement and fire protection personnel were exempted from Act 10's prohibition on bargaining for anything other than base wages, the state's regular biannual budget act prohibited bargaining over law enforcement and firefighter health insurance. [31] Ohio's enactment deemed "not appropriate" for bargaining, *inter alia*, health care benefits, except that the parties may agree that the employer will pay up to eighty-five percent of the premiums. [32]

New Jersey suspended bargaining over health care benefits for four years while a new statute is phased in. The statute sets a sliding scale according to salary of mandatory employee contributions to health care premiums and provides for health care plans to be designed by two state committees, one for education and one for the rest of the public sector. [33]

Massachusetts enacted a new method for local governments to make changes in health insurance. The governing body may adopt changes in accordance with estimated cost savings and proof of the savings. It gives notice to each bargaining unit and a retiree representative. The retiree representative and the bargaining

unit representatives form a public employee committee that negotiates with the employer for up to thirty days. After thirty days, the matter is submitted to a tripartite committee, which, within ten days, can approve the employer's proposed changes, reject them, or remand for additional information. The committee's decision is final.[34]

In its enactment subsequently rejected by voter referendum, Idaho limited negotiations for teachers to "compensation," which it defined as salary and benefits, including insurance, leave time, and sick leave.[35] Voter rejection of the enactment restores the prior bargaining regime whereby bargaining subjects were determined by an agreement between the parties. The Idaho enactment also limited collective bargaining agreements to one fiscal year, July 1 through June 30, and prohibited evergreen clauses or other provisions that allow a contract to continue until a new one is reached.[36]

Similar to Idaho, Indiana limited collective bargaining for teachers to wages and salary, and wage-related fringe benefits including insurance, retirement benefits, and paid time off.[37] The statute permits collective bargaining agreements to have grievance procedures, but deletes the prior law's express authorization for a grievance procedure culminating in binding arbitration.[38] The new statute prohibits bargaining on everything else, including express prohibitions on bargaining about the school calendar, teacher dismissal procedures and criteria, restructuring options, and contracting with an educational entity that provides post-secondary credits to students.[39] It also prohibits any contract that would place a school district in a budgetary deficit[40] and prohibits collective bargaining agreements from extending beyond the end of the state budget biennium.[41] The new law repeals a prior provision that authorized parties to agree to arbitrate teacher dismissals.[42]

The Indiana enactment provides that the parties shall discuss: curriculum development and revision; textbook selection; teaching methods; hiring; evaluation; promotion; demotion; transfer; assignment; retention; student discipline, expulsion, or supervision of students; pupil/teacher ratio; class size or budget appropriations; safety issues; and hours.[43] However, any agreements reached in such discussions apparently may not be included in the contract.

In addition to health care benefits, the Ohio enactment deemed the following inappropriate for collective bargaining: restricting contracting out or providing severance pay to employees whose jobs are contracted out; granting more than six weeks of vacation, more than twelve holidays, or more than three personal days; employer contributions to retirement systems; minimum staffing provisions, class

size and restrictions on school district authority to assign personnel; reductions in force of educational employees; and seniority as the sole factor in reductions in force.[44]

Michigan added to its list of prohibited subjects of bargaining for educational personnel. Decision and impact bargaining are now prohibited with respect to: placement of teachers; reductions in force and recalls; performance evaluation systems; the development, content, standards, procedures, adoption and implementation of a policy regarding employee discharge or discipline; the format, timing and number of classroom visits; the development, content, standards, procedures, adoption and implementation of the method of employee compensation; decisions about how an employee performance evaluation is used to determine performance-based compensation; and the development, format, content and procedures of notice to parents and legal guardians of pupils taught by a teacher who has been rated as ineffective.[45]

IV. IMPASSE RESOLUTION

Several jurisdictions made major changes to their impasse procedures, significantly increasing employer control over the final terms of employment. Wisconsin prohibited interest arbitration for all employees except law enforcement and firefighters.[46] Wisconsin now has no impasse procedures for most public employees. Of course, with bargaining limited to base wages, and further limited to changes in the CPI, there may not be much need for impasse resolution.

Had it not been overturned by voters, Idaho would have repealed its requirement of factfinding.[47] Under the new Idaho enactment, the parties were authorized, but not required, to mediate if they had not reached agreement by May 10.[48] If they did not reach agreement by June 10, the school board was required to unilaterally set the terms and conditions of employment for the coming school year by June 22.[49] But for the November 2012 referendum, the Idaho enactment invited school districts to simply run out the clock in bargaining and then impose whatever terms they desired, as the statute did not expressly limit the unilateral terms to those that had been offered to the union.

Since 1984, Ohio has recognized a right to strike for most public employees and a right to interest arbitration for the others. Ohio voters rejected the legislative enactment which would have prohibited strikes by all public employees and enforced the prohibition with fines for strikers of two days' pay for each day on strike, discipline or discharge of strikers, loss of dues checkoff for striking unions,

and strike injunctions.[50] The Ohio enactment also would have prohibited interest arbitration.

In place of strikes and interest arbitration, the Ohio enactment mandated factfinding if no agreement was reached forty-five days before scheduled expiration of an existing contract. The enactment required that the factfinder's primary consideration be the public interest and welfare and the employer's ability to pay. It limited the factfinder to considering the employer's financial status as of the time period surrounding negotiations, precluding consideration of potential increases in employer revenue or employer ability to sell assets. The enactment allowed either party by majority vote within fifteen days following the factfinder's recommendations to reject them. It required the Ohio State Employment Relations Board to publicize the rejected recommendations. Absent agreement within five days after publication, the parties were to submit their last best offers to the employer's legislative body whose chief financial officer would certify which offer cost more and hold a public hearing. Within fifteen days following contract expiration, the legislative body was to pick one party's final offer, with the employer's offer governing if no selection were made.[51]

New Jersey and Nevada made significant changes to their interest arbitration statutes. New Jersey amended its police and firefighter interest arbitration provisions to eliminate party selection of the arbitrator.[52] Now the Public Employment Relations Commission (PERC) randomly selects the arbitrator from a special panel.[53] Additionally, the parties must present written estimates of the financial impact of their final offers, and the award must be issued within forty-five days of arbitrator appointment (prior law allowed 120 days).[54] The award must address all statutory criteria and certify that the arbitrator took statutory limitations imposed by the local levy cap into account.[55] The award may be appealed to PERC, which must: decide the appeal within thirty days; address all statutory factors; and certify that it took the levy cap into account.[56] The statute caps arbitrator fees at \$1,000 per day and \$7,500 total, and it caps cancellation fees at \$500.[57] It also fines arbitrators \$1,000 per day for being late.[58] Further, the arbitrator's award may not increase base salary items by more than two percent of the aggregate amount expended by the employer in the twelve months immediately preceding expiration of the prior contract.[59] In addition, the arbitrator's award may not include base salary items and other economic issues that were not included in the prior contract. The cap on base salaries sunsets on April 1, 2014.[60]

In Nebraska, the Commission of Industrial Relations (CIR) performs interest arbitration. The new Nebraska Act provides detailed criteria for selecting an array

of comparable communities and specifies the number of comparable communities to be selected.[61] It mandates that if the employer pays compensation that is between 98 percent and 102 percent of the average of the comparables, including fringe benefits, the CIR must leave compensation unchanged.[62] If the employer's compensation is below 98 percent of the average, the CIR is to raise it to 98 percent, and if it is above 102 percent, the CIR is to lower it to 102 percent.[63] The targets are reduced to 95–100 percent during periods of recession, defined as two consecutive quarters in which the state's net sales, use taxes, and individual and corporate income tax receipts are below those of the prior year.[64]

Michigan amended its police and firefighter interest arbitration statute to provide for final offer issue-by-issue arbitration on economic issues, with traditional arbitration on other issues.[65] The Michigan enactment requires that the arbitrator to make the employer's financial ability to pay the primary factor in deciding the award.[66]

Indiana amended its teacher bargaining impasse procedures in a manner that is highly confusing. The new Indiana statute provides that if impasse is declared after at least sixty days of bargaining, the Indiana Educational Employment Relations Board (IEERB) is to appoint a mediator to conduct not more than three mediation sessions.[67] The mediation sessions must result in either an agreement between the parties or each party's last best offer and the fiscal rationale behind the offer.[68] If there is no agreement fifteen days after mediation has ended, the parties proceed to factfinding.[69] One section of the statute states that factfinding must culminate in the factfinder imposing terms,[70] but another section states that the factfinder is to issue a report and recommendations to the IEERB, which is then allowed to add to the recommendations.[71] This apparent inconsistency calls out for IEERB clarification.

V. FINANCIAL DISTRESS

Three states addressed governments experiencing financial distress. Nevada required contracts to provide for reopening in times of fiscal emergency.[72] The voter-rejected Ohio enactment provided for modification or termination of contracts if the state placed a local government on fiscal watch or fiscal emergency.[73]

The most far-reaching enactment and the greatest turmoil occurred in Michigan. The Michigan Local Government and School District Fiscal Accountability Act of 2011[74] specified procedures that could lead to a finding by the state of financial emergency. Upon such a finding, the governor appoints an emergency manager who, among other things, has the power to reject all or part of a contract upon

finding that: the financial emergency has created a circumstance making it reasonable and necessary for the state to intervene; the rejection is reasonable and necessary to deal with a broad, generalized economic problem; rejection is directly related to and designed to address the financial emergency; and rejection is temporary and does not target specific classes of employees.[75]

In the November 2012 elections, Michigan voters rejected the enactment in a referendum.[76] However, in December, the lame duck legislature enacted a new emergency manager law which reestablished the emergency manager's authority to abrogate contracts, including collective bargaining agreements.[77]

VI. INCREASED TRANSPARENCY

Three state enactments, two of which were rejected in voter referenda, opened the collective bargaining process to increased public observation. Under the Indiana statute, any party may inform the public of the status of collective bargaining as it progresses by release of factual information and expression of opinion based upon factual information. Any mediation report filed at the conclusion of mediation is open to public inspection. Factfinding hearings are open to the public and factfinding reports are open to public inspection.[78]

The Idaho enactment rejected by referendum would have required all negotiation sessions and all ratification meetings to take place in open meetings and all documents exchanged in bargaining to be public documents.[79] The Ohio enactment rejected by referendum required factfinding hearings to be open to the public at the request of either party and the parties' offers were to be posted on the Ohio State Employment Relations Board's or the employer's website.[80] It further provided that if the chief financial officer of a unit of local government determined that the final offer selected cost more than the final offer rejected, either party or a constituent supported by a petition signed by at least 5 percent of the electors who voted in the last gubernatorial election or 100 electors could force the matter to a referendum.[81]

VII. UNION FINANCES

Many of the recent enactments have attacked union finances and many of those have been attacked in the courts. Legislatures have taken steps to preclude unions from assessing agency shop or fair share fees against employees in the bargaining unit they represent who choose not to join the union. Legislatures have also taken steps to make it more difficult for unions to collect dues from those employees who voluntarily choose to join, by prohibiting employers from agreeing to dues check-offs or restricting such arrangements.

In 2012, amid much controversy, Indiana enacted a “right to work” law which prohibited union security agreements in the private sector.[82] A year earlier, amid much less controversy, Indiana prohibited such agreements in public education.[83] Similarly, Wisconsin prohibited agency shop or fair share fee agreements for all public employees except exempted public safety personnel.[84] The Dane County Circuit Court has enjoined the Wisconsin prohibition on fair share fee agreements as applied to municipal employees, holding it violated the U.S. and Wisconsin Constitutions.[85]

Following the November 2012 elections, the Michigan legislature enacted two right to work statutes, one governing the private sector,[86] and one governing the public sector.[87] The latter exempts police, firefighters and state troopers.[88] The differential treatment of public safety workers and other public employees may lead to a constitutional challenge to the statute. As discussed below, a Michigan enactment prohibiting dues check-off but only for teachers has been enjoined as unconstitutional.

Wisconsin Act 10 prohibits dues check-off for all employees except public safety personnel. In *WEAC v. Walker*,[89] a United States district court enjoined the prohibition as unconstitutional. Public safety employees were defined in Act 10 as police officers, firefighters, deputy sheriffs, county traffic police officers, village police officers and firefighters, state troopers, and state motor vehicle inspectors. The record reflected that the unions who represented the Milwaukee police and firefighters, the West Allis Professional Police Association, the Wisconsin Sheriffs and Deputy Sheriffs Association and the Wisconsin Troopers Association (representing troopers and motor vehicle inspectors) all had endorsed Scott Walker for governor in the 2010 campaign. In contrast, the unions representing other law enforcement and fire service employees, such as the Wisconsin Capitol Police, the University of Wisconsin Campus Police, state correctional officers, probation and parole officers, conservation wardens, fire crash rescue specialists, and state criminal investigation agents and the unions representing most other public employees in the state endorsed Governor Walker’s opponent.[90] In other words, Act 10 essentially prohibited dues check-off in bargaining units whose employees were represented by unions that had opposed Governor Walker’s election and allowed it in bargaining units whose employees were represented by unions that had supported the governor.

The court found that Act 10’s distinction between general and public safety employees for purposes of allowing or prohibiting dues check-off lacked any rational basis and, therefore, violated the Equal Protection Clause of the Fourteenth Amendment.[91] The court also found that it violated the First

Amendment. The court distinguished *Ysursa v. Pocatello Education Association*,^[92] where the Supreme Court upheld the constitutionality of Idaho's prohibition on any check-off of monies to be used for political purposes on the ground that the Wisconsin enactment did not apply across the board but instead discriminated on the basis of speaker viewpoint.

The fact that none of the public employee unions falling into the general category endorsed Walker in the 2010 election and that all of the unions that endorsed Walker fall within the public safety category certainly suggests that unions representing general employees have different viewpoints than those of the unions representing public safety employees. Moreover, Supreme Court jurisprudence and the evidence of record strongly suggests that the exemption of those unions from Act 10's prohibition on automatic dues deductions enhances the ability of unions representing public safety employees to continue to support this Governor and his party.^[93]

By a two-one vote, however, the Seventh Circuit Court of Appeals reversed. The majority characterized dues check-off as a government subsidy of speech and held that the government may discriminate in deciding what speech to subsidize. The court also reasoned that the unions had failed to prove viewpoint discrimination because some of the employees exempted as public safety employees from Act 10 had endorsed Governor Walker's opponent.^[94]

Similarly, in *United Food and Commercial Workers v. Brewer*,^[95] the court issued a preliminary injunction against the Protect Arizona Employees' Paychecks from Politics Act, which required unions whose members paid their dues by payroll deduction to certify that they did not use dues for political purposes or to specify the percentage of dues that they would use for political purposes. Payroll deduction of the percentage specified was prohibited unless the individual employee affirmatively consented to such deduction on an annual basis. ^[96] These restrictions did not apply to unions representing public safety employees or to other groups who received money by payroll deduction, such as retirement plan administrators, charitable organizations and insurance companies.^[97] The court issued a preliminary injunction, finding that the plaintiff unions were likely to succeed on the merits because the act unconstitutionally discriminated based on speaker viewpoint.^[98]

Michigan prohibited dues check-off for teachers.^[99] The U.S. District Court for the Eastern District of Michigan enjoined the prohibition, finding it to unconstitutionally discriminate on the basis of ideological viewpoint.^[100]

1. The Turmoil in Perspective

The second decade of the 21st century continues what appears to be shaping up as a three-decade long pattern of sharp swings in public sector labor legislation. The 1990s were characterized by considerable backlash against public employee collective bargaining, particularly in public education. In 1994, Michigan, where John Engler was twice elected governor in part by demonizing the Michigan Education Association, prohibited bargaining on: the identity of a school district's group insurance carrier; the starting day of the school term; the amount of required pupil contact time; and several other matters impacting employee working conditions.[101] Michigan also greatly strengthened its prohibition of public employee strikes.[102] Oregon amended its public employee collective bargaining statute to exclude from mandatory bargaining such subjects as class size, the school calendar, and teacher evaluation criteria.[103]

In 1993, Wisconsin enacted the qualified economic offer (QEO), which essentially preempted bargaining over school employee wages as long as the school district's wage offer met a prescribed formula.[104] Ohio prohibited bargaining on state university faculty workloads.[105]

The Chicago School Reform Act of 1995 prohibited decision and impact bargaining in the Chicago Public Schools and the City Colleges of Chicago on numerous matters that had previously been negotiated, including: subcontracting; layoffs and reductions in force; and class size, staffing, and assignment.[106] Pennsylvania adopted Act 46 in 1998, which provided that whenever the Philadelphia school system was found to be in financial distress, it would not be required to bargain over, among other matters, subcontracting, reductions in force, the school calendar, and teacher preparation time.[107] The entire New Mexico Public Employee Labor Relations Act sunset in 1999 when a Republican governor vetoed its extension.[108]

The first decade of the new century saw the pendulum swing in the opposite direction. Illinois amended the Chicago School Reform Act to change the prohibited subjects of bargaining to permissive subjects.[109] Illinois also imposed first-contract interest arbitration for bargaining units of thirty-five or fewer employees.[110] Wisconsin repealed the QEO, granted collective bargaining rights to state university faculty and research assistants, made teacher preparation time and changes to teacher evaluation plans mandatory subjects of bargaining, and mandated that grievance arbitration continue during contract hiatus periods.[111] Illinois, New Jersey, Oregon, New Hampshire, California, and Massachusetts mandated "card check" recognition.[112] Numerous states extended collective

bargaining rights to home health care aides and in-home daycare providers by designating the state as employer of record for collective bargaining purposes; otherwise, they would be considered independent contractors.[113] In 2003, New Mexico enacted a public employee collective bargaining statute that was stronger than the one that had sunset four years earlier.[114] In 2004, Oklahoma extended collective bargaining rights to employees of municipalities with populations of 35,000 or more.[115] But the pendulum reversed directions again following the 2010 elections.

Radical shifts in state policies toward public employee collective bargaining may simply be a sign of the times. A major political development has been a shift to single party dominance of state governments. If major change is, in part, a result of the erosion of the restraint posed where different parties control majorities in state houses and governorships, we may see a continuation of the trend of major shifts of the pendulum. After the 2012 elections, at least 37 states will have the same political party in control of both houses of the state legislature and the governorship.[116]

[1] See H.B. 1593, 53d Leg., 1st Sess. (Okla. 2011), 2011 O.S.L. 131, [H.B. 1593], *available at* <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=462098>.

[2] See Barbara Hoberock, *Fallin Signs Collective-Bargaining Bill*, TULSA WORLD, Apr. 29, 2011, *available at* 2011 WLNR 8420196 (quoting co-sponsor Representative Steve Martin); Sean Murphy, *Oklahoma Senate Approves Anti-Union Rights Bill*, *Tulsa World*, Apr. 19, 2011, http://www.tulsaworld.com/news/article.aspx?subjectid=336&articleid=20110419_336_o_OKLAHO385498 (quoting co-sponsor Senator Cliff Aldridge).

[3] Hoberock, *supra* note 2. Interestingly, the Oklahoma House defeated another bill, H.B. 1576, which would have amended Oklahoma's police and firefighter collective bargaining statute by giving municipalities the option of accepting the award of an interest arbitrator or rejecting it and returning to negotiations. The text of the bill is *available at*: http://webserver1.lsb.state.ok.us/cf_pdf/2011-12%20FLR/HFLR/HB1576%20HFLR.PDF.

[4] Tenn. Pub. Acts Ch. No. 378 (codified at TENN. CODE. ANN. § 49-5-601 (2011)).

[5] See Richard Locker, *Teacher Bargaining Hinges on GOP*, MEMPHIS COM. APPEAL, May 20, 2011, at B1, *available at* http://www.americanbar.org/content/dam/aba/publishing/aba_journal_labor_employment_law/jlel_v27n2.authcheckdam.pdf.

[6] See Richard Locker, *Teachers Rights to Negotiate Repealed—Late House Vote Kills Collective Bargaining by Teachers*, MEMPHIS COM. APPEAL, May 21, 2011, at A1, available at 2011 WLNR 10275968. Critics of the repeal charged that it was Republican retaliation against the Tennessee Education Association for supporting more Democrats than Republicans in the 2010 elections, noting that Representative Glen Casada, chair of the Republican caucus, had asked the union prior to the elections to increase its campaign contributions to Republicans to equal what it was giving to Democrats. Locker, *supra* note 38.

[7] Tenn. Pub. Acts Ch. No. 378 (codified at TENN. CODE. ANN. § 49-5-605(b)(1) (2011)).

[8] *Id.* § 49-5-605(b)(1), (2).

[9] *Id.* § 49-5-605(b)(4).

[10] *Id.* § 49-5-605(b)(5).

[11] *Id.* § 49-5-605(b)(6)(A).

[12] *Id.* § 49-5-602(2).

[13] *Id.* § 49-5-606(a)(3), (b)(2).

[14] *Id.* § 49-5-609(b).

[15] *Id.* § 49-5-609(d).

[16] See *id.* § 49-5-608(c).

[17] *Id.* § 49-5-608(a).

[18] *Id.* § 49-5-608(b).

[19] S.B. 98, §§ 5, 6, 76th Leg. (Nev. 2011) (codified at NEV. REV. STAT. § 288.140 (2011)).

[20] S.B. 5, 29th Gen. Assemb. (Ohio 2011), *amending* OHIO REV. CODE ANN. §§ 4117.01(K); (C)(10); (F)(2).

[21] 2011 Wis. Act 10 §§ 265 (state university faculty); 279 (U.W. Hospitals and Clinics), 280 (day and home health care providers).

[22] While Act 10 permits “public safety officers” to bargain collectively, its definition of “public safety officer” excludes certain law enforcement officers. For example, under Act 10, officers employed by the Wisconsin State Capitol Police and University of Wisconsin–Madison Police Department are not considered public safety officers, making them subject to Act 10. *See State Agents, DNR Wardens Not Exempt From Walker Cuts, Milwaukee J. Sentinel* (Feb. 18, 2011), <http://www.jsonline.com/news/statepolitics/116502363.html> (noting distinction between certain classes of law enforcement officers).

[23] 2011 Wis. Act 10 § 314 (codified at WIS. STAT. § 111.91(3)).

[24] *Id.*

[25] *Id.* § 169(1m) (codified at WIS. STAT. § 111.66.0508).

[26] *Id.* § 261.

[27] 824 F. Supp. 2d 856 (W.D. Wis. 2012), *aff’d in relevant part, rev’d in part*, 194 LRRM 3110 (7th Cir. 2013).

[28] *Id.* at 868.

[29] *Id.*

[30] No. 11-CV-3774 (Wis. Cir. Ct. Dane County Sept. 14, 2012), *appeal filed*, (Wis. Ct. App. Sept. 18, 2012).

[31] 2011 Wis. Act 32 § 2409cy (codified at WIS. STAT. § 111.70(4)(mc)5).

[32] S.B. 5, 129th Gen. Assemb. (Ohio 2011), *amending* OHIO REV. CODE ANN. § 4117.08(B)(2), (E).

[33] 2011 N.J. Laws ch. 78.

[34] 2011 Mass. Acts, ch. 69. Media reports suggested that in April when the Massachusetts House passed more restrictive legislation, President Obama’s Director of Intergovernmental Affairs telephoned Massachusetts Governor Deval Patrick with concerns about the bill, which had been strongly opposed by organized labor. The governor negotiated changes with labor leaders whose attitude changed from a vow to fight the legislation “to the bitter end” to support and congratulations to the governor for “listening to labor’s concerns.” *See Michael Levenson, National Scrutiny for Mass. Labor Law*, BOS. GLOBE, July 12, 2011, *available at* 2011 WLNR 13742434.

[35] S.B. 1108 § 17, 61st Leg. (Idaho 2011); see Emilie Ritter Saunders, *Map: Voters Overturn Luna's Education Laws, Reject Propositions 1, 2, And 3*, STATE IMPACT (Nov. 7, 2012, 4:04 PM), <http://statimpact.npr.org/idaho/maps/map-voters-overturn-lunas-education-laws-reject-prepositions-1-2-and-3/>.

[36] S.B. 1108 § 22, 61st Leg. (Idaho 2011).

[37] Senate Enrolled Act No. 575 § 14, 117th Gen. Assem. (Ind. 2011) (codified at Ind. Code Ann. § 20-29-6).

[38] *Id.* § 17.

[39] *Id.* § 15.

[40] *Id.* § 13.

[41] *Id.* § 16.

[42] *Id.* § 6.

[43] *Id.* § 18.

[44] S.B. 5, 129th Gen. Assem. (Ohio 2011), *amending* OHIO REV. STAT. ANN. §§ 4117.08(B)(4) (contracting out); 4117.105(B) (severance pay to employees whose jobs have been contracted out); 4117.108(A)(1) (vacation); 4117.108(A)(2)–(3) (holiday and personal time); 4117.08(B)(3) (employer contribution to the public employees retirement system); 4117.08(B)(5) (staffing); 4117.081(B)(1) (school district authority to assign); 4117.081(B)(3) (class size); 4117.081(B)(4) (RIF-educational employees); 306.04(B) (seniority-transit); 709.012 (seniority-firefighters); 3316.07(A)(11) (seniority-nonteaching school employees).

[45] 2011 Mich. Pub. Act 103 (codified at MICH. COMP. L. ANN. § 432.215(3)(j)–(p)).

[46] 2011 Wis. Act 10 § 233.

[47] S.B. 1108 § 22, 61st Leg. (Idaho 2011).

[48] *Id.* § 20.

[49] *Id.*

[50] S.B. 5, 129th Gen. Assem. (Ohio 2011), *amending* OHIO REV. STAT. ANN. § 4117.12(B)(4). See Ohio Sec'y of State, State Issue 2: November 8, 2011 (2011),

available at <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2011results/20111108Issue2.aspx> (reporting referendum results).

[51] S.B. 5, 129th Gen. Assemb. (Ohio 2011), *amending* OHIO REV. STAT. ANN. § § 4117.14(D)(2).

[52] 2010 N.J. Sess. Law Serv. Ch. 105, sec. 1, Pub. L. 1977, c. 85, § 3(e)(1) (*amending* N.J. STAT. ANN. § 34:13-A-16 (West 2010)).

[53] *Id.*

[54] *Id.* at sec. 1, § 3(f)(5).

[55] *Id.*

[56] *Id.* at sec. 1, § 3(f)(5)(a).

[57] *Id.* at sec. 1, § 3(f)(6).

[58] *Id.* at sec. 1, § 3(e)(4).

[59] *Id.* at sec. 2(b) (*amending* N.J. STAT. ANN. § 34:13A-16.7 (West 2010)).

[60] *Id.* at sec. 4 (*amending* N.J. STAT. ANN. § 34:13A-16.9 (West 2010)).

[61] L.B. 397, 102d Leg., 1st Sess., sec. 10 (Neb. 2011) (*amending* NEB. REV. STAT. § 48-818 (2011)).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] Act effective July 20, 2011, 2011 Mich. Pub. Acts 116, sec. 8 (*amending* MICH. COMP. LAWS § 423.238 (2011)).

[66] *Id.* at sec. 9 (*amending* MICH. COMP. L. ANN. § 423.239 (2011)).

[67] S.B. 575, 117th Gen. Assem., 1st Reg. Sess., sec. 1.22 (Ind. 2011) (*amending* IND. CODE § 20-29-6-13 (2011)).

[68] *Id.*

[69] *Id.* at sec. 1.23 (*amending* IND. CODE § 20-29-6-15 (2011)).

[70] *Id.*

[71] *Id.* at sec. 1.28 (*amending* IND. CODE § 20-29-8-7 (2011)).

[72] S.B. 98, § 7(2)(w), 76th Leg. (Nev. 2011).

[73] S.B. 5, 129th Gen. Assemb. (Ohio 2011), *amending* OHIO REV. CODE ANN. § 4117.104(A).

[74] 2011 Mich. Pub. Act. No. 4.

[75] *Id.*

[76] *See* Nancy Kaffer, *Voters Reject Attacks on Constitution*, DETROIT FREE PRESS, Nov. 7, 2012, at 1.

[77] 2012 Mich. Pub. Acts 436; *see* Chad Livengood & Shawn D. Lewis, *New EM Law Could Be Used to Appoint a Financial Czar in Detroit*, DETROIT NEWS, Dec. 28, 2012, at <http://www.detroitnews.com/article/20121221/Politics02/212280373/New-em-law-could-used-appoint-financial-czar-Detroit?>

[78] Senate Enrolled Act No. 575 § 1, 117th Gen. Assemb. (Ind. 2011).

[79] S.B. 1108 § 15, 61st Leg. (Idaho 2011).

[80] S.B. 5, 129th Gen. Assemb. (Ohio 2011), *amending* OHIO REV. CODE ANN. § 4117.14.

[81] *Id.* *amending* OHIO REV. CODE ANN. § 4117.141.

[82] H. Enrolled Act No. 1001, 117th Gen. Assembly (Ind. 2012).

[83] Prior to the 2011 enactment, the Indiana Court of Appeals held lawful a collective bargaining agreement provision obligating teachers who were not members of the union to pay the union a fair share fee, as long as failure to pay was not grounds for the nonpayer's dismissal. *Ft. Wayne Educ. Ass'n v. Goetz*, 443 N.E.2d 364 (Ind. Ct. App. 1982). The 2011 enactment prohibited bargaining over all subjects, presumably including union security, except for wages and wage-related fringe benefits. *See supra* note 37-43 and accompanying text. Indiana has no statute conferring collective bargaining rights on public employees outside of public education but municipalities may confer such rights on their employees. *See AFSCME v. City of Gary*, 578 N.E.2d 365 (Ind. Ct. App. 1991). In 1990, Indiana Governor Evan Bayh issued an executive order conferring collective bargaining

rights on state employees. Exec. Order 90-6 (Ind. 1990). Although Governor Mitch Daniels, on his first full day in office in 2005 revoked the executive order, thereby eliminating collective bargaining for state employees, see Steven Greenhouse, *In Indiana, Clues to Future of Wisconsin Labor*, N.Y. TIMES, Feb. 26, 2011, the Indiana Court of Appeals held lawful a fair share fee provision of a collective bargaining agreement negotiated under the Bayh executive order. *Byrd v. AFSCME*, 781 N.E.2d 713 (Ind. Ct. App. 2003). By analogy to *Byrd*, with the absence of any statutory prohibition, it is arguable that union security provisions in municipal collective bargaining agreements remain lawful in Indiana.

[84] 2011 Wis. Act 10 §§ 219, 276.

[85] *Madison Teachers, Inc. v. Walker*, No. 11-CV-3774 (Wis. Cir. Ct. Dane County Sept. 14, 2012), *appeal filed*, (Wis. Ct. App. Sept. 18, 2012).

[86] 2012 Mich. Pub. Acts 348.

[87] 2012 Mich. Pub. Acts 349.

[88] *Id.* §§ 14(4)(a)(i), (ii).

[89] 824 F. Supp. 2d 856 (W.D. Wis. 2012), *aff'd in part, rev'd in relevant part*, 104 LRRM 3110 (7th Cir. 2013).

[90] *Id.* at 864-65.

[91] *Id.* at 876.

[92] 555 U.S. 353 (2009).

[93] *WEAC*, 824 F. Supp. 2d at 873. The court also quoted Wisconsin State Senate Majority Leader Scott Fitzgerald's comments that Act 10 would deny funds to President Obama's reelection campaign. *Id.* at 875 n.17.

[94] *Wisconsin Educ. Ass'n v. Walker*, 104 LRRM 3110 (7th Cir. 2013).

[95] 817 F. Supp. 2d 1118 (D. Ariz. 2011).

[96] *Id.* at 1121-22.

[97] *Id.*

[98] *Id.* at 1124-27.

[99] 2012 Mich. Pub. Acts No. 53 (codified at MICH. COMP. LAWS ANN. § 423.210 (West 2011)).

[100] *Bailey v. Callaghan*, 873 F. Supp. 2d 879 (E.D. Mich. 2012), *stay denied*, 2012 WL 3134338 (E.D. Mich. Aug. 1, 2012).

[101] 1994 Mich. Pub. Acts 446 (codified at *Mich. Comp. Laws Ann.* § 423.215 (West 2011)).

[102] *Id.* (codified at *Mich. Comp. Laws Ann.* § 423.202 (West 2011)).

[103] 1995 Or. Laws 286 (codified at OR. REV. STAT. ANN. § 243.650(7)(e) (West 2011)).

[104] 1993 Wis. Sess. Laws 26 (codified at WIS. STAT. ANN. § 111.70(1)(nc)). In 2009, Wisconsin repealed the QEO in 2009 Wis. Sess. Laws 179 The text of the Act is *available at*: <https://docs.legis.wisconsin.gov/2009/related/acts/28.pdf>.

[105] 1993 Ohio Laws 3341 (codified at OHIO REV. CODE ANN. § 3345.45 (West 2011)); see *Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124 (1999) (upholding constitutionality of the prohibition).

[106] 1995 Ill. Laws 440, § 10, 516-518 (codified at 115 ILL. COMP. STAT. ANN. 5/4.5 (West 2011)).

[107] See David J. Strom & Stephanie S. Baxter, *From the Statehouse to the Schoolhouse: How Legislatures and Courts Shaped Labor Relations for Public Education Employees During the Last Decade*, 30 J. L. & EDUC. 275, 295 (2001).

[108] See Michael Coleman, *Union Suit Against Gov. Rejected*, ALBUQUERQUE J., July 1, 1999, at A1, *available at* 1999 WLNR 2354044.

[109] 2003 Ill. Laws 18, § 10, 38-41 (codified at 115 ILL. COMP. STAT. ANN. 5/4.5 (West 2011)). This change became effective April 16, 2003.

[110] 2009 Ill. Laws 5800 (codified at 5 ILL. COMP. STAT. ANN. § 315/7) (West 2011).

[111] 2009 Wis. Sess. Laws 179 The text of the Act is *available at*: <https://docs.legis.wisconsin.gov/2009/related/acts/28.pdf>.

[112] 5 ILL. COMP. STAT. ANN. § 315/9(a-5) (West 2011); N.J. STAT. ANN. § 34:13A-5.1 (West 2011); OR. REV. STAT. ANN. § 243.682 (West 2011); S.B. 216, 160th Sess.

(N.H. 2007) (enacted), *repealed by* S.B. 589, 162d Sess. (N.H. 2011); CAL. GOV'T CODE § 71636.3 (West 2011); MASS. GEN. LAWS ch. 150A, §§ 2, 5 (West 2011).

[113] *See generally* Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390 (2008).

[114] 2003 N.M. Laws 38 (codified at N.M. STAT. ANN. § 10-7E-1 to -26 (West 2011)).

[115] 2004 Okla. Sess. Laws 330 (codified at OKLA. STAT. §§ 51-200 to 51-220 (West 2011)). Oklahoma repealed these rights in 2011 Okla. Sess. Laws 395.

[116] *See* Monica Davey, *One Party Control Opens States to Partisan Rush*, N.Y. TIMES, Nov. 23, 2012, at A-1.

RECENT DEVELOPMENTS

By, Student Editorial Board

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Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes and the National Labor Relations Act.

I. IERLA DEVELOPMENTS

A. *Arbitration*

In *Griggsville-Perry Community Unit School Dist. No. 4 v IELRB*, 2013 IL 113721 (Ill. 2013) the Illinois Supreme Court reversed the appellate court's decision and confirmed the IELRB's ruling that an arbitrator who determined that a written notice provision within a collective-bargaining agreement was not satisfied when Griggsville-Perry Community Unit School District No. 4 only gave vague warnings drew this determination from the essence of the collective-bargaining agreement. In addition, the Illinois Supreme Court confirmed the IELRB's ruling that the arbitrator's interpretation drew from the essence of the collective-bargaining agreement when the arbitrator found that the employee was not at-will based on the language of the collective-bargaining agreement and the parties' bargaining history, despite the absence of any language in the agreement specifically stating the employee was not at-will.

In March 2008, a paraprofessional who was employed at an elementary school within the District was dismissed because she did not "relate well" to students and was "not always pleasant." This was communicated to the employee with a written letter that informed her of her dismissal and included an offer that the employee could respond to the deficiencies at a school board meeting. For approximately a year prior to the dismissal, the principal of the school in which the employee worked had several conversations with the employee concerning the employee's demeanor at work. These conversations were documented within a notebook. In addition to the conversations, the principal documented two incidents in which complaints were made against the employee concerning her attitude when interacting with children. The employee was never informed of either of these complaints nor were there investigations.

Prior to the school board meeting, the union representing the employee filled a grievance that focused mainly on the lack of specificity in the reasons for discharge, the lack of notice given to the employee concerning her poor performance, and the lack of opportunity for the employee to adequately respond to the negativity concerning her performance. The District denied the grievance and continued on to discharge the employee at the school board meeting after she was given an opportunity to speak.

After the discharge, the matter moved to arbitration. The arbitrator determined that the collective-bargaining agreement required the District to give the employee and fair hearing, and that the District failed to do that when it decided to dismiss the employee prior to informing her of issues concerning her job performance and making the decision to dismiss the employee prior to giving her an opportunity to speak at the school board meeting. The District refused to adhere to the arbitrator's award, and the employee's union filed an unfair labor practice charge against the District. The IELRB confirmed the arbitrator's award once amended to comply with a prior court decision. The District appealed and the appellate court reversed the IELRB ruling, finding that the arbitrator's interpretation of the written notice provision was deficient and erroneous and that the employee was in fact at-will. Both parties filed petitions for leave to appeal. Both petitions were granted and then consolidated.

The Illinois Supreme Court ruled that the appellate court erred in determining the correctness of the arbitrator's interpretation of the written notice provision within the collective-bargaining agreement. The only question for a court is whether the arbitrator's interpretation drew its essence from the collective-bargaining agreement. The supreme court found the arbitrator's interpretation that a vague written notice violated a written notice provision because the ambiguity gave no way for the employee to properly prepare and defend herself in front of the school board, which was the purpose of giving written notice, was clearly within the essence of the collective-bargaining agreement.

The district also argued, and the Illinois Appellate Court agreed, that even if the written notice provision was violated, the violation did not matter because the employee was at-will. The district pointed to evidence that during the negotiations over the collective-bargaining agreement both sides presented proposals concerning dismissal reasons, but neither was adopted and the final agreement was silent on the issue. The arbitrator disagreed with the district's assertion and again pointed the written notice provision, which would have served no purpose if employees covered by the collective bargaining agreement were at-will. Though, this did not mean that the employee could only be dismissed for just cause either,

since it was expressly discussed and not adopted. Rather, the arbitrator applied a standard of arbitrariness to the district's decision. Under this standard the arbitrator found that the districts' decision to dismiss was arbitrary due to the conclusory conclusions made by the district, the lack of investigation into complaints, and that the burden essentially rested on the employee to refute the characterizations.

The supreme court found that the arbitrator's interpretation in the matter was drawn from the essence of the collective-bargaining agreement. It also found that the arbitrator's interpretation had "ample support in case law." The appellate court pointed to *Bd. of Education of Harrisburg Community School Dist. No. 3 v. IELRB* 227 Ill.App.3d 208, 591 N.E.2d 85 (1992) to show that the arbitrator's ruling was incorrect. In *Harrisburg* an appellate court determined that an arbitrator was precluded from incorporating a just-cause standard into a collective-bargaining agreement where one was discussed during negotiations but not implemented. The supreme court agreed with the *Harrisburg* decision, but pointed out that the decision did not preclude the arbitrator from finding some standard of dismissal within the collective-bargaining agreement. Therefore, the supreme court found the arbitrator's interpretation of a standard of arbitrariness consistent with the *Harrisburg* decision and was an acceptable interpretation.

In sum, the Illinois Supreme Court held that an arbitrator's interpretation drew its essence from the collective-bargaining agreement when the arbitrator determined that a written notice provision within a collective-bargaining agreement did not allow for ambiguity. In addition, the supreme court allowed for an arbitrator's interpretation that a collective-bargaining agreement can contain some standard of dismissal even when for-cause was discussed in negotiation and not adopted.

In *Chicago Teachers Union and Chicago Board of Education*, Case No. 2011-CA-0091-C (IELRB 2012), the IELRB held that the Chicago Board of Education violated Section 14(a)(1) of the Act by refusing to arbitrate the union's grievances dealing with the employer's reclassification of certain probationary teachers as ineligible for rehire.

The events giving rise to the union's grievances began in June 2010, when the employer informed the union that it was instituting a new policy where it would rate as ineligible for rehire non-renewal probationary appointed teachers who had been rated unsatisfactory or non-renewed more than once. The employer began implementing this policy at the end of the 2009-2010 school year. Between January and March 2011 the union demanded arbitration on behalf of a handful union members affected by the new policy. The employer refused to arbitrate the

grievances, stating that the subject matter was inherently a management decision and, as a consequence, was not arbitrable under the collective bargaining agreement. The union subsequently filed an unfair labor practice charge with the IELRB alleging that the Employer violated section 14(a)(1) of the Act by refusing to arbitrate the grievances.

The IELRB first noted that an employer's refusal to arbitrate a grievance generally violates the Act, unless the employer can show either that no contractual agreement to arbitrate the particular dispute exists, or that arbitration of the grievance would conflict with outside law. The Board further noted that when evaluating whether a refusal to arbitrate is an unfair labor practice it will not look to the merits of the underlying grievance, but only to the agreement between the parties.

The IELRB concluded that a contractual agreement to arbitrate the grievances did exist and that the issues presented in the grievances presumptively fell within the scope of the collective bargaining agreement. The Board found a strong presumption in favor of arbitrability in Illinois and federal precedent and reasoned that parties to an agreement must explicitly exclude any issue that they wish to exclude from arbitration.

The Board stated that no such type of exclusionary language existed in the agreement at issue. To the contrary, the Board remarked that the contract language relating to grievance procedure was very broad.

The Board distinguished the relevant contract language from the grievance provision at issue in *Cobden Unit School District No. 17 v. IELRB*, 966 N.E.2d 503 (Ill. App. 1st Dist. 2012). In *Cobden*, the court determined that certain portions of a grievance were not covered by the collective bargaining agreement, and therefore not subject to arbitration. However, according to the Board, the language of the grievance provision at issue in *Cobden* was much narrower in scope than that in the present case. In *Cobden*, a grievance was defined as "any claim by an employee or the Association that there has been a violation of the terms of this Agreement."

In sharp contrast to the *Cobden* grievance procedure language, of the collective bargaining agreement at issue stated in relevant part:

A grievance is a complaint involving a work situation; a complaint that there has been a deviation from, misinterpretation of or misapplication of a practice or policy; or a complaint that there has been a violation, misinterpretation or misapplication of any provisions of this Agreement.

Noting that the collective bargaining agreement stated that a matter is arbitrable as long as it involves a *work situation*, and the fact that tangential issues as to the content of certain of the grievants' personnel files were also contained in the union's grievances, the IELRB held that the grievances at issue were not contractually precluded from arbitration.

The Board next addressed the employer's second defense, that Section 4 of the IELRA, regarding management rights, precluded arbitration of the grievances. Section 4 of the Act states, *inter alia*: "Employers shall not be required to bargain over matters inherent in managerial policy, which shall include such areas of discretion or policy as the ... selection of new employees ..." The employer argued that the analysis used to determine whether a matter is a mandatory subject of bargaining, should apply to the present case. The IELRB found the law of scope of bargaining inapplicable to issues of arbitrability.

The Board further distinguished the present case from *Cobden*, illustrating that there would be no conflict with outside law should the employer submit to arbitration. In *Cobden*, certain statutory language divested an arbitrator of authority to consider the conduct at issue in the grievance. The Board reasoned that no such conflict existed in the instant case, and held that Section 4 of the Act did not preclude arbitration of the union's grievances.

B. Majority Interest Petitions

In *Board of Trustees of the University of Illinois at Urbana-Champaign and AFSCME, Local 698*, 29 PERI ¶ 67 (IELRB 2012), the IELRB held that fraud in the execution of a representation authorization card that is clear on its face requires a showing of deception through which the party is denied a full opportunity to read the document. In this decision, the IELRB held there was no fraud when it found no clear and convincing evidence that employees were denied the opportunity to read the authorization cards.

On March 23, 2012, the union filed a majority interest petition seeking to represent employees serving the University of Illinois at Urbana-Champaign in several classifications of veterinary technicians. The university objected to the petition, claiming that the authorization cards were obtained through fraud because union officials allegedly informed bargaining unit members that the authorization cards served as requests for additional information about the union. The university submitted affidavits from three employees that stated that the union organizers told them that the purpose of signing the cards was simply to obtain more information about the union.

The authorization cards stated the following:

I hereby designate the American Federation of State, County and Municipal Employees Council 31, AFL-CIO, as my exclusive bargaining representative. I understand that when a majority of my co-workers join me by signing a card, this card can be used to win AFSCME Council 31 representation for me and my coworkers by obtaining certification as our exclusive bargaining representative without an election.

The IELRB majority noted that the language was clear and found no evidence that employees were fraudulently induced to sign the cards. The IELRB noted that Section 7(c-5) of the IELRA requires “clear and convincing” evidence to prove fraud and that “clear and convincing” evidence has been defined as “the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the truth of the proposition in question...more than a preponderance while not quite approaching the degree of proof necessary to convict a person of a criminal offense.” Because the language was clear, the IELRB found that there was not clear and convincing evidence that employees were fraudulently induced to sign the cards.

Moreover, the IELRB reasoned that the employees should have been aware of what the cards said and that Illinois courts have stated that:

[o]ne is under a duty to learn, or know, the contents of a written contract before he signs it, and is under a duty to determine the obligations which he undertakes by the execution of a written agreement. And the law is that a party who signs an instrument relying upon representations as to its contents when he has had an opportunity to ascertain the truth by reading the instrument and has not availed himself of the opportunity, cannot be heard to say that he was deceived by the misrepresentation.

The IELRB further noted that fraud involves some deception through which a party is denied a full opportunity to read the document. The IELRB further observed that the party must not have been able to discover the truth through a reasonable inquiry, or must have been prevented from making a reasonable inquiry. However, in this case, the IELRB found no evidence that the employees were denied a full opportunity to read the cards or that the truth was fraudulently concealed. Thus, the IELRB held that, regardless of whether the employees who gave the affidavits read the authorization cards before signing them, the university did not present clear and convincing evidence that the authorization cards were obtained through fraud.

The IELRB also noted that the Illinois Supreme Court, in *County of DuPage v. ILRB*, 231 Ill.2d 593, 900 N.E.2d 1095 (2008), stated that the majority interest process in the IELRA was based on the New York statute. In that case, the supreme

court presumed that the Illinois legislature was aware of the rules adopted by the New York Board, and that the Illinois legislature intended similar results. The IELRB presumed the same. Consequently, the IELRB found another avenue by which to affirm the Executive Director's dismissal of the university's fraud-based objection when it noted that the New York Board has found the probative value of affidavits to be relatively weak in comparison to explicit language on cards. Thus, the IELRB affirmed the Executive Director's dismissal of the university's objection to the majority interest petition based on the union's alleged fraud in obtaining the authorization cards.

II. IPLRA DEVELOPMENTS

A. *Confidential Employees*

In *Department of Central Management Services/Department of State Police v. ILRB*, 980 N.E.2d 1259, (Ill. App. 4th Dist. 2012) the Fourth District Appellate Court held that an attorney for the State Police qualified as a confidential employee under the authorized access test, vacating, in part, the ILRB State Panel's certification of representation including the attorney in a stand-alone bargaining unit. The ILRB State Panel had ruled that the attorney position in question was not subject to either the Act's managerial or confidential exclusions. The Appellate Court agreed with the ILRB that the attorney position did not meet the requirements of the managerial exclusion, but found the attorney qualified as a confidential employee based on the position's job responsibilities even though he had never actually worked on any matter involving labor relations or accessed any materials relating to collective bargaining.

On October 26, 2009 the Illinois State Employees Association, Laborers International Union, Local 2002 filed a representation-certification petition seeking to create a collective bargaining unit consisting of four positions classified as public service administrator, option 8L, or staff attorney with the State Police and Illinois Emergency Management Agency. The Department of State Police objected to including the public service administrators, option 8L, in the bargaining unit.

In October 2010 an ALJ issued a recommended decision including two of the three attorneys, William Jarvis and Nicholas Kondelis, in the bargaining unit based on the finding that neither of their positions qualified as confidential or managerial. The third attorney was not included based solely on a lack of evidence regarding the position. The employer filed exceptions to the ALJ's recommended decision.

The State Panel upheld the ALJ's determination that Jarvis was not a confidential employee and excluded him from the bargaining unit. As for Kondelis, the State Panel agreed he did not qualify for either exclusion and certified the bargaining unit including him. The employer appealed.

The court upheld the ILRB's determination that Kondelis did not qualify as a managerial employee. Section 3(j) of the IPLRA defines "managerial employee" as "an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices." The ILRB had concluded that Kondelis' primary duties of assisting in merit-board cases and advising personnel in the Department's forensic science laboratories did not make him a managerial employee.

The court distinguished *Salaried Employees of North America (SENA) v. ILRB*, 202 Ill. App. 3d 1013, 1022, 560 N.E.2d 926, 933 (1990). Unlike the department in *SENA* that functioned as a single cohesive unit with no formal distinction between management and the union employees, the employer's legal office had a "clear hierarchy and division of labor." Although Kondelis worked on merit-board cases he could not accept or reject settlement offers, lacked authority to file a complaint, and the only union members involved in hearings he participated in belonged to unions other than the Illinois State Employees Association.

The court next examined the ILRB's finding that Kondelis did not qualify as a confidential employee. The IPLRA defines "confidential employee" as "an employee who, in the regular course of his or her duties, assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations or who, in the regular course of his or her duties, has authorized access to information relating to the effectuation or review of the employer's collective bargaining policies."

Under the authorized access test, an employee is considered confidential if he or she is authorized to access information concerning matters specifically related to the collective bargaining process. Information related to collective bargaining includes: (1) the employer's strategy in dealing with an organizational campaign, (2) actual collective-bargaining proposals, and (3) the information relating to matters dealing with contract administration. *City of Evanston v. ILRB*, 227 Ill. App. 3d 955, 978, 592 N.E.2d 415, 430 (1st Dist. 1992). An employee's access to confidential information relating to "the general workings of the department or to personnel or statistical information upon which an employer's labor relations

policy is based is insufficient to confer confidential status.” The employee must have access to this information in the regular course of his or her duties.

The ALJ had found that Kondelis did not have to access to “conservations, documents, meetings, or any other communications concerning to labor relations.” Further, the ALJ determined that since Kondelis’ job duties did not relate to collective bargaining, contract matters, or contract administration, he did not regularly handle or have access to information that had the potential to provide advance notice to the bargaining unit on labor-relations matters. Based on these findings, the ALJ determined Kondelis did not qualify as a confidential employee.

The court noted that both the ALJ and the ILRB analyzed the Kondelis’ position based only on the work he previously had performed and did not look more broadly to all of his job responsibilities. Before examining Kondelis’ job responsibilities, the court acknowledged precedent out of the First District Appellate Court addressing the risk, and courts’ general preference, not to look at possible future job responsibilities in determining whether an employee qualifies as confidential. *One Equal Voice v. IELRB*, 333 Ill. App. 3d 1036, 777 N.E.2d 648 (Ill. App. 1st Dist. 2002). The rationale for this approach stems from concerns that employers will use anticipated duties as a way to exclude employees from bargaining units.

Although acknowledging the concerns raised by *One Equal Voice*, the court determined that the facts of this case were distinguishable because Kondelis’ job responsibilities were not speculative. The court found that Kondelis qualified as a confidential employee, because the State Police’s legal office already had the responsibility of providing advice to the labor-relations division, there was evidence that attorneys in the office actually work on matters related to collective bargaining, and the Chief Counsel for the legal department testified that any type of work can potentially be assigned to any employee in the department.

Based on this evidence, the court held that part of the public administrator option 8L’s job responsibilities included providing advice to the labor relations division and, therefore, these employees had authorized access to information concerning the collective-bargaining process between labor and management. That Kondelis never had any such assignment did not matter because this work could be assigned to him or any other attorney in the position. The court held that when applying the authorized-access test, it is necessary to consider “the position’s job responsibilities and not just what the current position holder just happens to have done so far in the position.” The court reasoned that only looking at the work

completed by the employee, and not including the work that could be done based on a given position's responsibilities, would too easily lead to absurd results.

B. Managerial Employees

In *Department of Central Management Services/Pollution Control Board v. ILRB*, 2013 IL App (4th) 110877, 194 L.R.R.M. (BNA) 3041 (Ill.App. 4th Dist. 2013), the Fourth District Appellate Court reversed the ILRB State Panel's ruling that attorney-assistants employed by the Pollution Control Board (PCB) were not managerial employees under the IPLRA. The court held that the attorney-assistants were managerial employees as a matter of law due to "their unique duties and independent authority as surrogates to the PCB members."

The events giving rise to this case began in February 2010, when the American Federation of State, County, and Municipal Employee (AFSCME) filed a majority interest representation petition with ILRB. AFSCME was seeking to include the attorney-assistants of the PCB into an existing bargaining unit.

The PCB is a quasi-judicial and quasi-legislative organization that implements environmental regulations, drafts and issues environmental regulations, and governs the actions of the Illinois Environmental Protection Agency. It is made up of five full-time members, each of which is allowed to hire an assistant. These assistants have traditionally been attorneys. These attorney-assistants assist the full-time members of the PCB by offering advice regarding the legal matters affecting the PCB. In addition, the duties of the attorney-assistants included drafting and issuing administrative adjudicatory decisions. The court considered these duties to be very similar to that of a judicial law clerk and that the attorney-assistants and the board members they worked with shared "a unity of professional interests."

The court examined two previous Fourth District decisions concerning whether ALJs were considered managerial in order to compare ALJs' qualities to those of the attorney-assistants. In *Dep't of Cent. Mgmt. Servs./Ill. Human Rights Comm'n v. ILRB, State Panel*, 406 Ill.App.3d 310, 943 N.E.2d 1150 (4th Dist. 2010), the court found that Human Rights Commission ALJs were managers as a matter of law, since the ALJs had the authority to essentially act on behalf of the Human Rights Commission. In *Dep't of Cent. Mgmt. Servs./Ill. Commerce Comm'n v. ILRB*, 406 Ill.App.3d 766, 943 N.E.2d 1136 (4th Dist. 2010), the court did not conclude that Commerce Commission ALJs were managers as a matter of law, because the ALJs did not become "surrogates" of the Commerce Commission. Using these two previous decisions as a backdrop, the court determined that because the attorney-assistants had independent authority and acted as

“surrogates” of the PCB, much like the Human Rights Commission ALJs, the attorney-assistants were managers as a matter of law.

In sum, the Fourth District held that assistants or attorneys of a governmental board that has quasi-judicial and quasi-legislative authority will be considered managers as a matter of law if they act as “surrogates” of the governmental board or share “a unity of professional interests” with the governmental board.

III. NLRA DEVELOPMENTS

A. *Charter Schools*

In *Chicago Mathematics & Science Academy Charter School, Inc and Alliance of Charter Teachers & Staff, IFT, AFT*, 359 NLRB No. 41 (NLRB 2012), the National Labor Relations Board found that a private, nonprofit corporation that established and operates a public charter school in Illinois is not a political subdivision of the State of Illinois but, rather, is an “employer” within the meaning of Section 2(2) of the National Labor Relations Act, subjecting the corporation to the NLRB’s jurisdiction. The Board made clear that it was not establishing a bright-line rule that it had jurisdiction over entities that operate charter schools, wherever they are located, but instead its decision was specific to the operation of public charter schools under the particular provisions of Illinois law.

On June 23, 2010, Chicago Alliance of Charter Teachers & Staff, IFT, AFT filed a majority interest petition with the Illinois Educational Labor Relations Board seeking to represent teachers employed by CMSA. On July 29, 2010, CMSA filed a representation petition with the NLRB. On September 20, 2010, the Acting Regional Director for Region 13 dismissed CMSA’s petition. On January 10, 2011, the Board granted review.

The NLRB noted that Illinois Charter Schools Law provides the framework for establishment and operation of charter schools in Illinois. Generally, the Charter Schools Law permits local public school boards to contract with third parties to provide educational services to children who typically are served by local public schools. A charter school is responsible for the management and operation of its own financial affairs, and its board of directors is ultimately responsible for governing the school and upholding the charter agreement. The charter agreement provides that the local school board may withhold funds if the charter school violates the terms of its charter.

CMSA is a private, nonprofit corporation that was established in 2003, by five individuals, under the Illinois General Not-for-Profit Corporation Act of 1986 for

the purpose of operating a charter school. CMSA's board of directors conducts CMSA's affairs. No government entity has the authority to appoint or remove a CMSA board member, and no member of the board of directors is a government official or works for a government entity.

Upon its incorporation, CMSA successfully submitted a proposal to the Board of Education of the City of Chicago (Chicago Board) to obtain a charter agreement to establish a charter school. This charter agreement expressly acknowledges that CMSA is not operating as an agent of the Chicago Board and that the charter may be revoked by the Chicago Board for a material violation of any its terms.

CMSA receives about 80 percent of its budget to operate the school from the Chicago Board, with the remainder coming from Federal and State sources. CMSA is required to submit a proposed budget to the Chicago Board but the Chicago Board merely reviews the budget and has never rejected CMSA's budget proposals. Ultimately, CMSA's board of directors approves CMSA's budget.

The NLRB noted that Section 2(2) of the NLRA provides that the term "employer" shall not include any state or political subdivision thereof, but acknowledged that "political subdivision" is not defined in the NLRA. The Board further noted that the case was governed by the Board's longstanding test as examined by the Supreme Court in *NLRB v. Natural Gas Utility of Hawkins County*, 402 U.S. 600 (1971). Under that test, an entity may be considered a political subdivision if it is either (1) created directly by the state so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or the general electorate. In this case, the Acting Regional Director for Region 13 found that the school was a political subdivision under both prongs of *Hawkins County*. However, the NLRB noted that it has previously held that the language of Section 2(2) "exempts only government entities or wholly owned government corporations from its coverage — not private entities acting as contractors for government." Applying this precedent the NLRB found that CMSA is not a political subdivision of the State of Illinois under either prong of the *Hawkins County* test.

The NLRB found that CMSA failed the first prong of the *Hawkins County* test because it was created by private individuals and not by a government entity, special legislative act, or public official. The Board noted that there is no Illinois statute, including the Charter Schools Law, that directs that charter schools be created. Rather, CMSA was the result of private individuals and the separate authority of the Not-for-Profit Corporation Act. The Board further noted that it has consistently held that entities created by private individuals as nonprofit

corporations are not exempt under the first prong of *Hawkins County* and that an entity is not exempt simply because it receives public funding or operates pursuant to a contract with a governmental entity.

The NLRB found that CMSA failed the second prong of the *Hawkins County* test because it is not administered by individuals who are responsible to public officials or the general electorate. The Board found it dispositive that none of CMSA's governing board members are appointed by, or subject to removal by, any public official. The Board noted that in determining whether an entity is administered by individuals who are responsible to public officials, the "relevant inquiry" is whether a majority of the individuals who administer the entity—the governing board and executive officers—are appointed by and subject to removal by public officials. The Board noted that an entity will be subject to the Board's jurisdiction when the appointment and removal of a majority of an entity's governing board members is controlled by private individuals—as opposed to public officials. Applying these principles, the Board found that none of CMSA's board members are responsible to public officials and, therefore, CMSA is not "administered" by individuals who are responsible to public officials or the general electorate.

The NLRB found that CMSA, not being a political subdivision of the State of Illinois under *Hawkins County*, is an "employer" within the meaning of Section 2(2) of the Act. The Board noted that there was no dispute that CMSA controlled most, if not all, matters relating to the employment relationship involving the petitioned-for teachers. Thus, similar to other cases involving government contractors, the Board found that CMSA was an "employer" within the meaning of Section 2(2) of the Act, meaning that the Board had jurisdiction over CMSA.